Roman, Inc. *and* Bricklayers and Allied Craftworkers Local 1 of Pennsylvania and Delaware. Case 4–CA–30461

September 30, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On February 7, 2002, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judges rulings, findings, and conclusions as modified below and adopt the recommended Order.

1. The judge held that the Respondent violated Section 8(a)(1) of the Act by interrogating employee-applicant Bernard Griggs concerning his union activities and by telling him that it had changed its decision to hire him because of those activities. The judge also held that the Respondent violated Section 8(a)(3) by failing to hire Griggs.

The Respondent has not specifically excepted to the judge's legal reasoning or conclusions. It does except, however, to some of his credibility determinations and evidentiary rulings, and thus implicitly contests the factual basis for the judge's conclusions. For the reasons that follow, we reject the Respondent's arguments.[1]

The judge admitted into evidence a statement made by the Respondent's counsel in a letter to the Regional Director dated July 18, 2001. The Respondent excepts to this ruling, contending that the letter was part of settlement negotiations and therefore was inadmissible. We find no merit in that contention. Contrary to the Respondent, the letter was not part of settlement negotiations. Rather, it was a position statement made in course of the investigation of the charge and therefore was admissible. See *McKenzie Engineering Co.*, 326 NLRB 473, 485 fn. 6 (1998); *Optica Lee Borinquen, Inc.*, 307 NLRB 705 fn. 6 (1992); *Massillon Community Hospital*, 282 NLRB 675 fn. 5 (1987); *Bond Press, Inc.*, 254 NLRB 1227 fn. 1 (1981).[2] The Respondent also contends that the judge improperly relied on a sentence in the July 18 letter that was not admitted into evidence, to discredit the testimony of Scott Roman. We reject that contention as well. Although the judge inadvertently quoted from the excluded portion of the letter, his credibility determination was amply supported by the admitted portion and other evidence.

Additionally, the judge refused to allow the Respondent's counsel to use a wage rate summary to refresh the recollection of witness Scott Roman. In its exceptions, the Respondent notes that the judge apparently based his ruling on the inadmissibility of the summary. As the Respondent points out, however, a document used to refresh a witness' recollection need not be admissible. But although we find merit in the Respondent's exception, the judge's ruling was harmless error. Even without the summary, Roman was able to make the key point that all of the individuals hired after January 1, 2001, were hired at a rate well below Griggs' requested wage rate. Thus, the Respondent has failed to show that the summary would have enabled Roman to provide details that would have strengthened the Respondent's case.

2. At the hearing, the judge refused to allow either counsel for the General Counsel or the Respondent's counsel to introduce evidence concerning whether the Respondent would have terminated Griggs for making false statements in his job application. However, the judge reconsidered his ruling, and in his decision (fn. 2) found that the issue could be raised at compliance. The General Counsel cross-excepts to this finding. We find no merit in the cross-exception. Although we agree with the judge that this issue should have been litigated at the hearing, there is no reason why it now cannot be raised at the compliance stage. See, e.g., *Control Services*, 305 NLRB 435, 437 fn. 12 (1991); *Storer Communications*, 297 NLRB 296, 301 fn. 32 (1989). And because the issue can be fully litigated at compliance, we also reject the General Counsel's contention that we should find, on the present record, that the Respondent would not have fired Griggs because of the misrepresentations on his application.[3]

[1] As stated above, the Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Members Cowen and Bartlett agree that under current Board precedent a party's position statement that it provides during the course of the Region's investigation is admissible as evidence. However, in the view of Members Cowen and Bartlett, the Board would be well served by undertaking a comprehensive reexamination of this rule with the assistance of amici briefing.

[3] We also leave to compliance the related issue of whether the Respondent improperly failed to provide the General Counsel with subpoenaed records concerning discharges and, if so, whether a sanction would be appropriate. See *Bannon Mills*, 146 NLRB 611, 613 fn. 4, 633–634 (1964).

We agree with the judge that instatement and backpay are appropriate remedies for the Respondent's refusal to hire Griggs. However, we

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Roman, Inc., Berlin, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Donna Brown, Esq., for the General Counsel.
Patrick T. Cronin, Esq. (Cronin & Musto), of Haddonfield, New Jersey, for the Respondent.
Claiborne S. Newlin, Esq. (Meranze and Katz, P.C.), of Philadelphia, Pennsylvania, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on December 17, 2001. The charge was filed by the Bricklayers and Allied Craftworkers Local 1 of Pennsylvania and Delaware (the Union) on June 25, 2001,[1] and the complaint was issued August 17. The complaint alleges that Roman, Inc. (Respondent) violated Section 8(a)(1) of the Act by interrogating an employee-applicant concerning his union activities and telling the employee-applicant that it had changed its decision to hire him because of his union activities, and Section 8(a)(3) and (1) by failing to hire Bernard A. Griggs. Respondent filed a timely answer that, as amended at the hearing, admitted the allegations of the complaint concerning the filing and service of the charge, jurisdiction, labor organization status, and agency. The answer denied the substantive allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, has been engaged as a caulking and waterproofing and masonry contractor in the construction industry at its facility in Berlin, New Jersey, where it annually performs services valued in excess of $50,000 outside the State of New Jersey. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

As indicated, Respondent is engaged in providing masonry and waterproofing services. Ronald Roman is Respondent's president, Scott Roman is vice president, and Leo Baiocco is project manager. The business is seasonal and the number of employees fluctuates during the year. During May 2001, Respondent employed about 15–18 employees in four classifications. Supervisors earned $18–19.50 per hour; foremen earned $13–18 per hour; caulkers earned $10–13, and laborers earned $8–10.

B. Griggs Applies for Work

Bernard A. Griggs is an organizer for the Union. On May 17, he called Respondent and spoke to a secretary. Griggs asked if they were hiring and the secretary said that they were; she suggested that Griggs come to Respondent's facility and complete an application. She then passed the call through to Scott Roman. Griggs introduced himself and told Roman that he was looking for work. Roman said that they had a lot of work and asked what experience Griggs had. Griggs explained that he had 10 years' experience in complete masonry restoration and that he specialized in caulking and waterproofing. Roman asked if Griggs had experience working on swing stage scaffolding. Griggs said that not only did he have experience working on that, but he also had experience setting it up. Griggs also said that he had some experience in running jobs as a foreman. Roman said that that was very good, he could use a guy like Griggs, and that he had two positions open for caulkers. Roman asked how much Griggs was making at his current job and Griggs said $22 per hour. Roman said that he could work with that. He told Griggs to call back later that day and talk with Baiocco to arrange a time for an interview and to complete an employment application. Later that day, Griggs called Baiocco, who said that he was expecting the call. They arranged to meet the following morning. Significantly for credibility purposes, Baiocco mentioned that he had to drop off his daughter first before the meeting.

The next day Griggs went to Respondent's facility. As he entered he noticed a sign that read: "Help Wanted. Laborers Caulkers Plasters." The sign also had Respondent's telephone number. Griggs filled out the employment application that the receptionist gave him and then went into Baiocco's office. Baiocco reviewed Griggs' application page by page. Griggs' application indicated that he was applying for a "caulker-masonry restoration" position and that he was seeking pay rate of over $20 per hour. Griggs asked if the application was complete and Baiocco said that it was and that everything looked good. Baiocco said that the company had a lot of work in Wilmington and Newark, and that he would be able to hire Griggs and pay him better than $20 an hour or so. Baiocco said that Griggs would start work on Monday, May 21, but that Griggs should call on Friday to find out the location because Baiocco did not know then whether it would be in Wilmington or Newark. Baiocco gave Griggs his business card and told him again to call the next day. Baiocco agreed to pay him $22 per hour. Griggs testified that entry-level caulkers receive $15–16 per hour and that for a caulker to receive $22 per hour he would have to have experience, which he did. Roman admitted that a caulker position was available, but not at wage rate that Griggs sought. Baiocco also admitted at the time he spoke with Griggs Respondent was looking to hire caulkers.

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also leave to compliance proceedings the determination of how long Griggs would have been employed and whether he would have been transferred to subsequent jobsites. See *Dean General Contractors*, 285 NLRB 573, 574 (1987).

[1] All dates are in 2001 unless otherwise indicated.

On Friday, Griggs called as instructed and spoke with Baiocco who said that he would not be able to hire Griggs. Griggs asked why, and Baiocco responded by asking Griggs if it was true that he was union organizer and that he goes around trying to organize nonunion companies. Before Griggs could answer, Baiocco also asked if Griggs worked for a union company called Melrose and if he tried to organize another company called Jamison Contractors. Griggs answered yes. Baiocco said that Respondent was a nonunion company and Griggs would not be organizing there. Griggs said that Baiocco had earlier said that he would definitely be starting work for the Company the coming Monday. Baiocco answered yes, but that was before they found out that Griggs was a union organizer. Baiocco said that if he had known that Griggs was a union organizer he never would have hired him. Baiocco told Griggs not to call the Company again.

In May, Respondent began work on a project in Little Falls, Delaware. Baiocco admitted that this project involved mobilizing swing scaffolding and that this work required experienced employees. Respondent also had begun planning to perform work later that year on the Interchange Business Park project also in Delaware. Roman testified Respondent did not hire any caulkers, foremen, or supervisors in May, and that since May 18, Respondent has hired only laborers. On May 8, a caulker/foreman employed by Respondent quit; his pay at that time was $12.50 per hour.

C. Credibility Resolution

The foregoing facts are essentially based on Griggs' testimony, which I have determined to credit. I recognize that Griggs credibility is subject to challenge. On direct examination Griggs admitted that he may have "bolstered my past employment just a little bit" because he really wanted the job, but otherwise the application was correct. On cross-examination Griggs admitted that he lied on his application in that regard. The employment application shows that Griggs omitted to list his previous employers and he never worked for the employers that he did list. It also shows that Griggs indicated that he was not employed, when in fact, he was employed by the Union at the time he completed the application. Griggs also certified on the application that its contents were true and accurate. Griggs explained that he was concerned that he would not be hired if he disclosed his union affiliation.

Roman, on the other hand, testified that he did speak with Griggs by telephone concerning employment. Roman stated that during the conversation Griggs indicated that he sought employment at the rate of close to $30 per hour. However, in Roman's pretrial affidavit he stated that the wage rate Griggs was seeking during the telephone conversation was $25 per hour. Roman testified that he told Griggs that he could not pay that rate, but that he nonetheless told Griggs that he could talk to Baiocco. Roman denied that he told Griggs that there were positions available.

Baiocco testified that he did interview Griggs. He explained that he reviewed Griggs' application briefly and "that was basically it." Baiocco testified that during the interview he and Griggs talked about the Company and that he told Griggs about a couple of bigger projects that were coming up and that they could use him on. Baiocco denied that he ever told Griggs that he was hired. He testified that he believed that Griggs was seeking employment as a supervisor and that no such positions were available. However, when asked why under those circumstances he proceeded on the next day to check the references on Griggs' employment application, Baiocco's thoroughly unconvincing explanation was "we always check references." When prodded further by counsel, Baiocco testified that he thought he talked to Griggs about the two employers listed by Griggs on his employment application and that Griggs basically said that he was working at one of the employers. Baiocco testified that he never talked with Griggs before the meeting or again after the interview. However, this testimony is clearly incorrect. Roman himself admitted that Baiocco spoke directly with Griggs to arrange the interview. Further, Baiocco admitted that he has a young daughter who he has to take to the babysitter every morning, conforming to Griggs testimony that Baiocco mentioned this fact when they discussed the time that the interview would be held. In response to a patently leading question, Baiocco explained the existence of the help-wanted sign outside Respondent's facility by testifying that it was there basically to generate a potential pool of applicants. Roman, who heard this testimony, reiterated it when he was called to testify. Yet neither gave a specific instance when they conducted an interview and received a job application at times when they were not hiring. Moreover, if Respondent had a practice of accumulating applications the production of those applications would have been a way to support that testimony. Respondent produced no documents to support that testimony.

Roman testified that when an employee seeks a job with Respondent at a rate of over $20 per hour the only position sustaining such a rate was a supervisory one. He explained that no such positions were open at the time Griggs applied. Yet Roman did not credibly explain why he failed to mention this to Griggs or why he arranged for Griggs to be interviewed by Baiocco. Moreover, in its statement of position submitted to the Regional Director during the investigation of the charge filed in this case, Respondent made no mention of a contention that it did not hire Griggs because he was seeking a supervisory position. Rather, it stated that Griggs applied for a caulker mechanic position and "frankly, there really was no hiring determination in this case since there was no open caulker mechanic position at the time Mr. Griggs applied." At the hearing Roman was led by counsel to testify that the letter should have read "caulker foreman supervisor." This testimony was so thoroughly unconvincing that it displayed a propensity to comport the testimony to suit the argument.

Moreover, as the Union points out in its brief, at the time of the Griggs interview Respondent was mobilizing swing scaffolding on the project in Wilmington, that this required the work of more skilled employees, and Griggs told Respondent that he had such skills. This supports Griggs testimony that he was hired as a highly skilled caulker.

Based on these observations and the record as a whole, I conclude that the testimony of Roman and Baiocco is much less credible than Griggs' testimony. Moreover, I have considered the relative demeanor of the witnesses. This factor also supports my conclusion that Griggs' testimony should be credited.

D. Analysis

The complaint alleges that Respondent violated the Act by telling Griggs that he would not be hired because he supported the Union. I have described above how Baiocco told Griggs that he would not be able to hire Griggs, that Respondent was a nonunion company and Griggs would not be organizing there, and that if he had known that Griggs was a union organizer he never would have hired him. I conclude that by telling an employee-applicant that he would not be hired because he supported a union, Respondent violated Section 8(a)(1). *Atlas Transit Mix Corp.*, 323 NLRB 1144,1150 (1997).

The complaint also alleges that Respondent violated the Act by interrogating Griggs concerning his union activities. I have found that during the same conversation described above, Baiocco asked Griggs if it was true that he was union organizer and that he goes around trying to organize nonunion companies. Before Griggs could answer Baiocco also asked if Griggs worked for a union company called Melrose and if he tried to organize another company called Jamison Contractors. Griggs answered yes. Interrogation of an employee is not per se unlawful. Rather, the General Counsel must show that the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Emory Worldwide*, 309 NLRB 185, 186 (1992). The Board examines the totality of circumstances to determine whether questioning of an employee about union activities is coercive. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). The test is an objective one and applies to applicants for employment. *C.P. Associates, Inc.*, 336 NLRB 167 (2001). Here, although Griggs' responses to the questioning were truthful, the interrogation was directly coupled with the unlawful statement described above. Under these circumstances I conclude that by coercively questioning an employee applicant about his union activities, Respondent violated Section 8(a)(1).

I turn now to the allegation that Respondent unlawfully failed to hire Griggs. In *FES*, 331 NLRB 9 (2000), the Board described the burdens the parties carry in a refusal-to-hire case. The General Counsel must first show: (1) that Respondent was hiring or had plans to do so, (2) that the applicant had the experience or qualifications required for the positions the respondent was planning to fill, and (3) that antiunion animus contributed to the decision not to hire the applicant. Here the evidence shows that Respondent had plans to hire Griggs. This is obviously demonstrated by the fact that after Baiocco interviewed Griggs he told Griggs that he was hired and that would begin work the following Monday. *C.P. Associates*, supra. This conclusion is buttressed by the fact that Respondent had a help wanted sign displayed on its facility and had recently begun work on a project that needed someone with Griggs' special skills. Respondent contends that it assumed that Griggs was applying for a supervisory position and no such position was available. But for reasons described above, I have not credited the testimony supporting such an argument, so that argument fails. It is also clear that Griggs had the experience and qualifications for the position. Again, this is most visibly shown by the fact that Respondent, in fact, decided to hire him. Finally, the fact that antiunion animus contributed to the decision not to hire Griggs is shown directly by the Section 8(a)(1) violations described above. I conclude that the General Counsel has met his initial burden.

Under *FES*, once the General Counsel has met his burden, an employer may avoid liability by showing that it would not have hired the applicant even in the absence of his union affiliation. Respondent contends that it has met this burden by showing that although it hired a number of employees after Griggs applied for work, it hired no one at or near the pay rate that Griggs sought. I do not agree. The evidence shows that Respondent decided to hire Griggs at the higher rate, presumably because of his skills and experience. That it later hired employees at lower rates with lesser skills does not establish that it would not have hired Griggs even absent his union activity. I, therefore, conclude that by refusing to hire Griggs because of his union activity, Respondent violated Section 8(a)(3) and (1).[2]

CONCLUSIONS OF LAW

1. By telling an employee applicant that he would not be hired because he supported a union and by coercively questioning an employee applicant about his union activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By refusing to hire Bernard Griggs because of his union activity, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent having discriminatorily refused to hire an employee, it must offer him instatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

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[2] At the hearing the General Counsel attempted to introduce evidence to show that Respondent would not have terminated Griggs because of the false statements contained in his job application. Because Respondent had not asserted at the hearing or in its answer that it was contending it would have terminated Griggs for those reasons, I did not allow the General Counsel to introduce this evidence. Later in the hearing, Respondent also attempted to introduce evidence on this subject. I, likewise, did not allow Respondent to do so. In hindsight, and with a clearer and timely presentation of the issues by the parties, it would have been preferable to litigate this issue at the hearing. However, under these circumstances I shall allow Respondent to raise this matter during the compliance stage of these proceedings. I disagree with the General Counsel that Respondent has waived its right to raise this matter or that *FES* precludes the litigation of this issue during compliance.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

ORDER

The Respondent, Roman, Inc., Berlin, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employee–applicants that they would not be hired because they supported a union.

(b) Coercively questioning employee applicants about their union activities.

(c) Refusing to hire or otherwise discriminating against employees because of their union activity.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Bernard Griggs full instatement to the position he would have been placed, absent discrimination and, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he would have enjoyed.

(b) Make Bernard Griggs whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Berlin, New Jersey, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 18, 2001.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT tell employee-applicants that they would not be hired because they supported a union.

WE WILL NOT refuse to hire or otherwise discriminate against any of you for supporting the Bricklayers and Allied Craftworkers Local 1 of Pennsylvania and Delaware, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Bernard Griggs full instatement to the position he would have been placed, absent discrimination or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he would have enjoyed.

WE WILL make Bernard Griggs whole for any loss of earnings and other benefits resulting from the refusal to hire him, less any net interim earnings, plus interest.

ROMAN, INC.

Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."